RECORD AND BRIEFS

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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. 1369(b)(1) over petitions for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act, 33 U.S.C. 1251 *et seq.*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 817 F.3d 261.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-50a) was entered on February 22, 2016. Petitions for rehearing were denied on April 21, 2016 (Pet. App. 51a-52a). On July 1, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 2, 2016, and the petition was filed on that date. The petition was granted on January 13, 2017. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth at App. 1a-43a, *infra*.

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Central to the Act is Section 1311, which generally bars "the discharge of any pollutant by any person," 33 U.S.C. 1311(a), unless the person who discharges the pollutant "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted); see, *e.g.*, *NRDC, Inc.* v. *U.S. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) (describing the prohibition on unlicensed discharges as the statute's "first principle"); see also *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 298 (2009) (Ginsburg, J., dissenting) (describing this provision as the statute's "core command").

A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). "[N]avigable waters," in turn, are "the waters of the United States." 33 U.S.C. 1362(7). Accordingly, whether a person's conduct is subject to the prohibition set forth in Section 1311(a) generally depends on whether (1) a pollutant (2) was added (3) to waters of the United States (4) from a point source. See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988).

If Section 1311 applies, a discharge of pollutants must generally be authorized by a permit under the National Pollutant Discharge Elimination System (NPDES)

program. 33 U.S.C. 1311, 1342. NPDES permits may be issued by the EPA Administrator or by a State that is authorized to operate an NPDES program. They generally control discharges from point sources to waters of the United States by establishing permissible rates, concentrations, quantities of specified constituents, or other limitations and conditions as appropriate. See 33 U.S.C. 1342(a)(1) and (2); 40 C.F.R. Pts. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

Discharges of "dredged or fill material" can be authorized under a separate permitting program operated by the Secretary of the Army, acting through the United States Army Corps of Engineers (the Corps), or by an authorized State. 33 U.S.C. 1344(a), (d), and (g); see generally 33 C.F.R. Pts. 320-332; 40 C.F.R. Pts. 230-232; see, *e.g.*, *Coeur Alaska, Inc.*, 557 U.S. at 266, 268-269. In addition to limiting discharges of pollutants through Section 1311 and related provisions, the CWA contains a variety of other provisions that assist in achieving the Act's basic purposes. *Inter alia*, the Act creates research and related programs, 33 U.S.C. 1251-1275 (2012 & Supp. III 2015); provides for grants for construction of treatment works, 33 U.S.C. 1281-1301 (2012 & Supp. II 2014); and authorizes grants to the States, 33 U.S.C. 1381-1387 (2012 & Supp. II 2014).

b. To "establish a clear and orderly process for judicial review," the CWA vests federal courts of appeals with exclusive original jurisdiction to review certain categories of EPA decisions implementing the Act. H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972) (House Report); see S. Rep. No. 414, 92d Cong., 1st Sess. 85 (1971) (Senate Report) (noting the need for "even and con-

sistent" application of nationwide administrative actions). Actions reviewable directly in the courts of appeals include actions of the EPA Administrator:

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title [the section authorizing NPDES permits].

33 U.S.C. 1369(b)(1).[1]

A petition for review generally must be filed within 120 days after the challenged agency action. 33 U.S.C. 1369(b)(1). When multiple petitions challenge a single action, the petitions are consolidated in one court of appeals, which is chosen randomly from among the circuits in which petitions were filed in the ten days after the challenged action occurred. 28 U.S.C. 2112(a)(3). Any agency action "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2); see *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 607 (2013). Section 1369(b) thus promotes the ability of the regulated community, regulators, and the public to rely on the validity of agency actions that are not promptly challenged or that are upheld by a court of appeals.

Final EPA actions that are reviewable under principles of administrative law, but for which direct review in the courts of appeals is not authorized by Section 1369(b)(1), may be challenged in federal district court

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[1] Five additional categories of EPA actions are subject to court of appeals review, 33 U.S.C. 1369(b)(1)(A)-(D) and (G), but those categories are not at issue in this case.

under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704; 28 U.S.C. 1331. An APA action may be brought at any time within six years after the date of the challenged action. 28 U.S.C. 2401(a).

c. In 2015, EPA and the Corps jointly promulgated the Clean Water Rule (the Rule). 80 Fed. Reg. at 37,054. The Rule amended the regulatory definition of the CWA term "waters of the United States," which governs the geographic scope of effluent limitations under Section 1311 and the coverage of other provisions of the Act.

EPA and the Corps had previously issued regulations that defined the term "waters of the United States," see 42 Fed. Reg. 37,124, 37,127 (July 19, 1977); 51 Fed. Reg. 41,216-41,217 (Nov. 13, 1986), but this Court had held that the agencies' application of that definition was overbroad in some respects, *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). In addition, the prior regulations did not provide detailed guidance for determining whether particular wetlands were CWA-protected "waters of the United States." See *Rapanos* v. *United States*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring in the judgment). Several Members of this Court accordingly suggested that the agencies "clarif[y] * * * the reach" of the statute by further developing a definition of the term "waters of the United States." *Sackett* v. *EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring); see *Rapanos*, 547 U.S. at 757-758 (Roberts, C.J., concurring); 547 U.S. at 811-812 (Breyer, J., dissenting). The Chief Justice, for example, noted that while EPA and the Corps have "generous leeway" in interpreting the

CWA, their jurisdictional determinations would necessarily proceed "on a case-by-case basis" unless and until those agencies finalized a clarifying rule on the scope of their authority. *Rapanos*, 547 U.S. at 757-758 (Roberts, C.J., concurring). Between the *Rapanos* decision and the promulgation of the Clean Water Rule, the Corps and EPA "made more than 400,000 CWA jurisdictional determinations," including more than 120,000 site-specific determinations that particular waters bore a sufficient nexus to navigable waters to qualify them as waters of the United States. 80 Fed. Reg. 37,065 (June 29, 2015).

The Clean Water Rule was intended to "provid[e] simpler, clearer, and more consistent approaches for identifying the geographic scope" of the Act. 80 Fed. Reg. at 37,057. The Rule identifies "three basic categories" of waters: "Waters that are jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional." *Ibid.* The agencies specified that the Rule was issued under the legal authority provided by the CWA, including Section 1311, which governs effluent limitations, and Section 1342, which governs NPDES permitting. *Id.* at 37,055.

2. a. Soon after the promulgation of the Clean Water Rule, numerous parties challenged the Rule in the courts of appeals, invoking the authorization for direct court of appeals review in Section 1369(b)(1). The challengers included respondents Agrowstar, et al.; respondents Amicus Farm Bureau Federation, et al.; the respondent States; and respondents Waterkeeper Alliance, et al.

The challenges were consolidated in the Sixth Circuit, which issued a nationwide stay of the Clean Water Rule pending further proceedings. See Pet. App. 3a, 5a. Petitioner intervened in the consolidated suits and moved to dismiss them, contending that the court of appeals lacked jurisdiction to consider the Clean Water Rule and that litigation over the Rule's validity should instead occur in district court.

b. The court of appeals denied petitioner's motion, concluding that the challenges had been properly brought under Section 1369(b)(1). Pet. App. 3a-45a.

i. Judge McKeague, who announced the judgment of the court, concluded that two provisions of Section 1369(b)(1) authorized immediate court of appeals review of the Clean Water Rule. Pet. App. 3a-26a. He found the Rule to be reviewable under 33 U.S.C. 1369(b)(1)(E), which covers "any effluent limitation or other limitation" under provisions including Section 1311. He concluded that the Rule establishes a limitation because the Rule's definition of "waters of the United States" expanded "regulatory authority in some instances," thereby "impos[ing] * * * additional restrictions on the activities of some property owners" and "altering permit issuers' authority to restrict point-source operators' discharges into covered waters." Pet. App. 15a. Judge McKeague further observed that EPA had relied in part on Section 1311(a) as a source of its authority to promulgate the Rule. *Id.* at 15a-16a n.4.

Judge McKeague concluded that the court of appeals also had jurisdiction to review the Clean Water Rule under 33 U.S.C. 1369(b)(1)(F), which authorizes review of EPA action "in issuing or denying any permit" under the NPDES program. Pet. App. 17a-24a. He observed that this Court in *Crown Simpson Pulp Co.* v. *Costle*,

445 U.S. 193, 196-197 (1980) (per curiam), had rejected a "strict literal application" of Section 1369(b)(1)(F), and had construed the provision to encompass agency action that is "functionally similar" to the issuance or denial of a permit. Pet. App. 17a. Relying on *Crown Simpson* and on a subsequent Sixth Circuit decision, Judge McKeague concluded that, because the Clean Water Rule "indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways," the rule is reviewable under Section 1369(b)(1)(F). *Id.* at 21a.

ii. Judge Griffin concurred in the judgment. Pet. App. 27a-45a. He agreed that Section 1369(b)(1)(F) vested the court of appeals with jurisdiction under Sixth Circuit precedent, which he saw as consistent with "the predominant view of the other circuits." *Id.* at 44a & n.2. He explained, however, that if that binding circuit authority were absent, he would have concluded that the rule was not subject to review under Section 1369(b)(1)(F). *Id.* at 45a. Judge Griffin also concluded that the Clean Water Rule was not reviewable under Section 1369(b)(1)(E). *Id.* at 29a-38a. In his view, the Rule does not establish an "other limitation" within the meaning of that provision because the Rule interprets a term in the Act's definitional section and "sets the jurisdictional reach for whether the discharge limitations even apply in the first place." *Id.* at 32a.

iii. Judge Keith dissented. He would have held that neither Section 1369(b)(1)(E) nor Section 1369(b)(1)(F) conferred jurisdiction to review the Clean Water Rule. Pet. App. 45a-47a.

c. After this Court granted certiorari, the Sixth Circuit issued an order holding all further proceedings in abeyance. 15-3751 C.A. Doc. 171-2 (Jan. 25, 2017).

3. Meanwhile, petitioner and other parties filed at least 16 parallel APA challenges to the Clean Water Rule in district courts throughout the country. See Pet. Br. vi. The Judicial Panel on Multidistrict Litigation (MDL) denied the federal government's motion to consolidate the pending district court challenges, concluding that the MDL statute (28 U.S.C. 1407) did not support consolidation of litigation centered on questions of law, and that the varying procedural postures of the challenges counseled against consolidation. *In re: Clean Water Rule: Definition of "Waters of the United States,"* 140 F. Supp. 3d 1340 (J.P.M.L. 2015).

Six of the district courts in which challenges to the Clean Water Rule were filed have ruled on their jurisdiction. Five of the six have concluded that they lack jurisdiction because Section 1369(b)(1) vests the courts of appeals with original and exclusive jurisdiction. See *Washington Cattlemen's Ass'n* v. *United States EPA*, No. 15-3058, 2016 WL 6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio* v. *United States EPA*, 15-cv-2467 Docket entry No. 54, at 1 (S.D. Ohio Apr. 25, 2016); *Oklahoma ex rel. Pruitt* v. *United States EPA*, No. 15-cv-381, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016); *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp.* v. *United States EPA*, No. 15-cv-110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015). One district court has held that it has jurisdiction to review the Rule. See *North Dakota* v. *U.S. EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015).

4. On February 28, 2017, the President issued an Executive Order directing EPA and the Corps to reconsider the Clean Water Rule. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The order declared it

to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." *Id.* § 1(a). It directed the issuing agencies to review the Rule for consistency with those objectives, and it instructed the agencies to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." *Id.* § 2(a).

The agencies subsequently issued a notice of proposed rulemaking entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules." 82 Fed. Reg. 34,899 (July 27, 2017). That notice proposes to rescind the Clean Water Rule and to recodify the prior regulatory definition of "waters of the United States" before beginning a new rulemaking process concerning the term.[2] *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals has jurisdiction to review the Clean Water Rule under the CWA provision authorizing direct appellate review. Jurisdiction is authorized under Section 1369(b)(1)(E), because a rule establishing the geographic scope of Section 1311's ban on unpermitted pollutant discharges imposes a "limitation under Section 1311," 33 U.S.C. 1369(b)(1)(E). And jurisdiction is also authorized under Section 1369(b)(1)(F), as construed in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S.

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[2] On March 6, 2017, the United States moved to hold the briefing schedule in this case in abeyance in light of the Executive Order and the attendant prospect that the Clean Water Rule will be rescinded or revised. On April 3, 2017, this Court denied that motion.

193, 196 (1980) (per curiam), because the Clean Water Rule establishes the boundaries of EPA's permitting authority. That reading of Section 1369(b)(1) is consistent with its text and history, and avoids the "truly perverse," *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977), and "seemingly irrational" bifurcation of closely related determinations between the district courts and courts of appeals, *Crown Simpson*, 445 U.S. at 197.

A. 1. Direct appellate review of the Clean Water Rule is authorized under Section 1369(b)(1)(E). Subparagraph (E) authorizes courts of appeals to review any EPA action "in approving or promulgating any effluent limitation or other limitation under" Section 1311—the provision that generally bars the discharge of pollutants except in compliance with requirements set out under the Act. 33 U.S.C. 1369(b)(1)(E). The expansive word "any" in Subparagraph (E) indicates that the subparagraph authorizes review of every sort of limitation under Section 1311.

The Clean Water Rule fits within that category. Effluent and other limitations under Section 1311 apply only to discharges of pollutants to "navigable waters," 33 U.S.C. 1311(a), 1362(12), which the Act defines as "the waters of the United States," 33 U.S.C. 1362(7). As a result, a rule defining certain waters as "waters of the United States" controls the geographic scope of all limitations imposed under Section 1311. Such a rule imposes restrictions on the activities of property owners and others, by generally prohibiting discharges of pollutants to the waters that the rule covers unless the discharges are authorized by permits. See 33 U.S.C. 1311, 1342, 1344. Indeed, the challengers object to the Clean

Water Rule precisely on the ground that it will constrain conduct on the covered waters. The Clean Water Rule also imposes limitations on permitting authorities. EPA and the States that issue NPDES permits are required to process applications for discharges of pollutants to waters that meet the Clean Water Rule's definition of "waters of the United States," and to incorporate into permits for discharges to those waters the effluent limitations promulgated under Section 1311. 33 U.S.C. 1311(a), 1342.

2. The Clean Water Rule is also reviewable under Section 1369(b)(1)(F). Subparagraph (F) authorizes direct appellate review of EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). In *Crown Simpson*, this Court agreed that Subparagraph (F) is properly understood to reach EPA actions that are "functionally similar" to the denial of a permit, because that interpretation "best comport[s] with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." 445 U.S. at 196. This Court also stated that Subparagraph (F) should be construed to avoid a "seemingly irrational bifurcated system" in which closely related EPA actions are routed to different levels of the courts. *Id.* at 196-197.

Under the functional approach of *Crown Simpson*, the Clean Water Rule is reviewable under Subparagraph (F). The CWA requires permits only for discharges to "waters of the United States." 33 U.S.C. 1342, 1362(7) and (12). As a result, the Clean Water Rule controls whether permits may or may not be issued for the bodies of water that it describes. Moreover, a narrow construction of Subparagraph (F) would result in a "seemingly irrational bifurcated system" of

review. 445 U.S. at 197. A challenge to an EPA determination that a particular site contains "waters of the United States" in an individual NPDES permitting decision would be reviewable directly in the court of appeals, but EPA's resolution of the same question on a more categorical basis through the Clean Water Rule would instead be reviewed in district courts across the country. Because that approach is not consistent with *Crown Simpson*, courts of appeals have generally construed Subparagraph (F) to cover rules that delineate EPA's jurisdiction to issue permits.

B. Petitioner's reading of Section 1369(b)(1) cannot be reconciled with the provision's structure and purpose. By routing cases directly to the courts of appeals, and requiring challenges to be brought within 120 days, Section 1369(b)(1) facilitates quick and orderly resolution of disputes concerning important rules that govern the scope of the CWA.

This Court has construed Section 1369(b)(1) to afford this expedited review to a coherent class of EPA actions, so that intertwined agency actions are routed through the same channels. In *E.I. du Pont*, this Court considered whether Section 1369(b)(1)(E) should be construed to provide direct appellate review for grants and denials of individual variance permits under Section 1311, but not "effluent limitations for classes and categories of existing point sources." 430 U.S. at 136. This Court rejected that interpretation, explaining that it "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions."

Ibid. The Court in *E.I. du Pont* relied on the same functional considerations in construing the scope of EPA's authority "to issue regulations establishing effluent limitations for classes of plants" under Section 1311, *id.* at 124, explaining that it would be "highly anomalous" if the agency's new-source regulations "were directly reviewable in the Court of Appeals," *id.* at 127-128, while existing-source standards "based on the same administrative record were reviewable only in the District Court," *id.* at 128. The Court in *Crown Simpson* similarly emphasized that Section 1369(b)(1) should be construed to avoid seemingly irrational bifurcation of related determinations. 445 U.S. at 196-197.

Petitioner's interpretation would create the irrational bifurcation that the Court in *E.I. du Pont* and *Crown Simpson* sought to avoid. Petitioner would construe Section 1369(b)(1)(E) as creating appellate jurisdiction to review EPA regulations setting numerical or qualitative effluent limitations, while authorizing district courts throughout the country to review regulations governing the same limits' geographic scope. That bifurcation would hinder regulated parties' efforts to obtain prompt clarification of their responsibilities under the CWA. Petitioner's narrow construction of Section 1369(b)(1)(F) would similarly generate "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations" establishing jurisdiction over those individual actions. *E.I. du Pont*, 430 U.S. at 136.

C. The CWA's legislative history confirms that Section 1369(b)(1) creates direct appellate jurisdiction over the Clean Water Rule. The House and Senate debates reflect an understanding that Section 1369(b)(1) would

generally provide jurisdiction over challenges to nationwide rules that EPA promulgated to implement the Act. For instance, the Senate Report stated that Section 1369(b)(1) would authorize expedited, centralized review of the "requirements, standards and regulations" that EPA established under the Act. Senate Report 84-85. And the Conference Report indicated that Section 1369(b)(1) would govern "any suit against a federal standard." H.R. Conf. Rep. No. 1465, 92d Cong., 2d Sess. 147 (1972). (Conference Report) Those descriptions counsel strongly against petitioner's interpretation of the statute. A judicial-review provision that did not reach a rule defining the geographic scope of the CWA's central provisions could not even loosely be described as covering EPA's "requirements, standards and regulations" under the Act or as conferring appellate jurisdiction over "any suit against a Federal standard" under the statute.

Congress's subsequent treatment of Section 1369(b)(1) is also inconsistent with petitioner's interpretation of the statute. After a functional approach to Section 1369(b)(1) was well-established in the decisions of this Court and the courts of appeals, Congress amended Section 1369(b)(1) to provide direct appellate review of certain additional decisions—but did not narrow the judicial-review provision's scope. That choice provides additional reason to adhere to the functional framework that Congress left in place.

A 1977 debate over a failed proposal to centralize review of nationwide regulations under the CWA in the D.C. Circuit provides further evidence of the broad scope of Section 1369(b)(1). Both supporters and opponents of the 1977 centralization proposal made clear their understanding that if Section 1369(b)(1) were left

untouched, the validity of major nationwide standards under the CWA would be litigated in the regional circuits—not in the district courts.

D. Any remaining ambiguity should be resolved in favor of appellate jurisdiction. The Court in *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985), held that if a statute contains a provision for direct appellate review, a court should "not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals" without "a firm indication" that Congress intended the claim at issue to be pursued in the district court. *Id.* at 745. That principle applies here, and confirms that the court of appeals has jurisdiction to consider challenges to the Clean Water Rule.

ARGUMENT

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE CLEAN WATER RULE

The CWA's judicial-review provision, 33 U.S.C. 1369(b)(1), vests the court of appeals with jurisdiction to consider the validity of the Clean Water Rule. First, the court of appeals has jurisdiction under Section 1369(b)(1)(E), because a rule establishing the geographic scope of Section 1311's ban on unpermitted pollutant discharges imposes a "limitation under Section 1311." 33 U.S.C. 1369(b)(1)(E). Second, the court of appeals has jurisdiction under Section 1369(b)(1)(F), because the Clean Water Rule establishes the boundaries of EPA's permitting authority. That reading of the pertinent jurisdictional provisions is consistent with their text and history, as well as with this Court's guidance that Section 1369(b)(1) should be construed to avoid the irrational bifurcation of closely related determinations. See *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193,

197 (1980) (per curiam); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977).[3]

A. The Clean Water Rule Is Subject To Direct Appellate Review Under The Text Of Both Section 1369(b)(1)(E) And 1369(b)(1)(F)

Both Section 1369(b)(1)(E) and Section 1369(b)(1)(F) authorize direct court of appeals review of the Clean Water Rule.

1. The Clean Water Rule is reviewable under Section 1369(b)(1)(E)

a. Section 1369(b)(1)(E) encompasses all EPA actions that impose limitations of any sort under Section 1311—the provision that forbids the discharge of pollutants except in compliance with specified provisions of the Act. The term "effluent limitation" is defined broadly, as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constit-

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[3] One of the respondents contends (Waterkeeper Resps. Br. 16-17, 24-26) that Section 1369(b)(1) does not allow review of the Clean Water Rule because the Assistant Secretary of the Army participated in the rulemaking. That argument lacks merit. The CWA authorized the Administrator to issue the Clean Water Rule. See 33 U.S.C. 1361(a) (specifying that the Administrator may "prescribe such regulations as are necessary to carry out [her] functions under" the Act); see *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att'y Gen. 197 (1979) (explaining that EPA has overall responsibility for administration of the Act, including the authority to interpret the term "navigable waters"). Section 1369(b)(1) authorizes "[r]eview of the [EPA] Administrator's action" in promulgating or approving effluent limitations under Section 1311 and in issuing or denying NPDES permits, whether or not an additional federal agency participates in the rulemaking. 33 U.S.C. 1369(b)(1).

uents which are discharged from point sources into" waters of the United States. 33 U.S.C. 1362(11). In addition to "effluent limitation[s]," Section 1369(b)(1)(E) encompasses the Administrator's promulgation of any "other limitation" under Section 1311. 33 U.S.C. 1369(b)(1)(E).

Section 1369(b)(1)(E)'s broad coverage is reinforced by Congress's repeated use of the word "any" across the relevant provisions. This Court has emphasized that "the word 'any' has an expansive meaning"—"one or some indiscriminately of whatever kind." *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) (citation omitted). Here, Congress used "any" both in the CWA's definition of "effluent limitation," 33 U.S.C. 1362(11), and in Section 1369(b)(1)(E)'s identification of the "effluent limitation[s] or other limitation[s]" that would be reviewable in the court of appeals, 33 U.S.C. 1369(b)(1)(E). That wording confirms that the statute should be read to reach all limitations of whatever kind that are imposed under Section 1311. Cf. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219-220 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind."); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (stating that, when "Congress did not add any language limiting the breadth" of "the phrase 'any other term of imprisonment,'" the Court should "read [it] as referring to all 'term[s] of imprisonment'") (citation omitted; brackets in original); see *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1 (1871).

EPA's action in issuing the Clean Water Rule readily qualifies as action promulgating or approving an "other limitation" under Section 1311. Limitations imposed

under Section 1311 apply only to discharges of pollutants to "navigable waters," 33 U.S.C. 1311(a), 1362(12), which the CWA defines as "the waters of the United States," 33 U.S.C. 1362(7). A rule that specifies which sites are "waters of the United States" imposes on persons who discharge pollutants to those waters the full panoply of effluent and other limitations under Section 1311. As a consequence of that directive, pollutant discharges to the covered waters are generally prohibited unless authorized by a permit. See 33 U.S.C. 1311, 1342, 1344. A rule that delineates the geographic scope of limitations promulgated under Section 1311 is thus every bit as integral to the CWA's practical effect on regulated parties as are the quantitative or qualitative requirements. In order for a regulated party to know what it is prohibited from doing, the party must know *both* those quantitative and qualitative requirements *and* the requirements' geographic scope.

Moreover, as Judge McKeague explained below, the rule "expan[ds] * * * regulatory authority in some instances" and thereby "impos[es] * * * additional restrictions on the activities of some property owners." Pet. App. 15a; see *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015) (explaining that the Clean Water Rule falls within Section 1369(b)(1)(E) because its "undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program"); *Murray Energy Corp.* v. *United States EPA*, No. 15-cv-110, 2015 WL 5062506, at *5 (N.D. W. Va. Aug. 26, 2015) ("Here, there is no dispute that the Clean Water Rule will have an impact on Murray's permitting requirements.").

Indeed, the challengers here object to the Clean Water Rule on the ground that it subjects them and others to restrictions under Section 1311 and related provisions. For example, petitioner's complaint alleges that the Rule "imposes impossible burdens" with which its members must "comply," and that it requires those members "either to alter their activities * * * or to obtain permits when previously they would not have had to." *American Farm Bureau Fed'n* v. *EPA*, 15-cv-165 Docket entry No. 1, at 3, 12, 14 (S.D. Tex. July 2, 2015). The Business and Municipal challengers assert that the rule subjects to CWA requirements waters that were not previously covered. Business and Municipal Challengers Br., 15-3751 C.A. Doc. 129-1, at 40-41, 58 (Nov. 1, 2016). And the state challengers assert that the rule would substantially burden state activities by subjecting additional waters to the Act's limitations. State Pets. Br., 15-3751 C.A. Doc. 128, at 63-64 (Nov. 1, 2016). While the federal respondents have disputed whether the Rule results in a net expansion of CWA jurisdiction, there is no dispute that the Rule categorically classifies as "waters of the United States" certain waters that previously would have been classified as such only based on a case-by-case analysis under *Rapanos* v. *United States*, 547 U.S. 715 (2006). See, *e.g.*, 33 C.F.R. 328.3(a)(6) and (c)(1) (categorical rule for adjacent wetlands).

The understanding that Section 1369(b)(1)(E) reaches regulations like the Clean Water Rule comports with common usage. To determine the extent of the "limitations" that a particular law imposes, one must identify the geographic coverage of the law as well as the range of conduct it forbids. Thus, a Sunday "blue law" that covered an entire State would impose greater

limitations on alcohol sales than a law that prohibited the same conduct but applied only within a single county. The Clean Water Rule's definition of the term "waters of the United States" is similarly integral to any effort to identify the "limitations" that Section 1311 imposes.[4]

The Clean Water Rule imposes corresponding limitations on permitting authorities as well. EPA and the States that issue NPDES permits are required to process permit applications for discharges of pollutants to waters that meet the Rule's definition of "waters of the United States," and to incorporate into permits they issue for discharges to those waters the effluent limitations promulgated under Section 1311. 33 U.S.C. 1311(a), 1342. Thus, by providing that particular waters are "waters of the United States," the Rule requires permitting authorities to subject discharges to those waters to the limitations of Section 1311. The

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[4] Many of the challengers argue that the Clean Water Rule is objectionable because it reflects an impermissible broadening of the prior regulatory definition of the term "waters of the United States." See p. 20, *supra*. The applicability of Section 1369(b)(1)(E), however, does not depend on that circumstance, since the availability of immediate court of appeals review turns on the nature of the challenged EPA action, not on the gravamen of the plaintiff's legal challenge. Thus, if EPA amended a numerical effluent limitation to make it less stringent than it previously had been, the amended limitation would be an "effluent limitation" subject to court of appeals review under Section 1369(b)(1)(E), even if the plaintiff asserted that EPA should have adhered to the prior more stringent version. Similarly here, the agencies' regulatory definition of "waters of the United States" is part and parcel of the overall "limitation[s]" that the CWA places on potential dischargers and on permit issuers. 33 U.S.C. 1369(b)(1)(E). As such, the reviewability of the Clean Water Rule does not depend on whether a challenger asserts that the Rule is too broad or too narrow.

plaintiffs who challenge the Clean Water Rule have acknowledged that effect, with the state respondents in support of petitioner seeking a stay of the Rule in part on the ground that it requires them to "create, process, and issue additional NPDES permits." 15-3799 C.A. Doc. 24, at 19 (Sept. 9, 2015) (citation omitted). The Clean Water Rule thus imposes "limitations on point-source operators and permit issuing authorities" alike. Pet. App. 17a.

Section 1311, moreover, is clearly designed so that critical aspects of its limitations are imposed through EPA regulations that define statutory terms. Section 1311 requires the achievement of "effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title," 33 U.S.C. 1311(b)(1)(A), and of effluent limitations for certain publicly owned treatment works "based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title," 33 U.S.C. 1311(b)(1)(B). Those provisions reflect Congress's intent that regulations defining the terms "best practicable control technology currently available" and "secondary treatment" would be among the mechanisms through which the Administrator imposed limitations under Section 1311. 33 U.S.C. 1311(b)(1)(A) and (B).

b. Petitioner does not dispute that the Clean Water Rule has the practical effect of subjecting property owners and other pollutant dischargers to effluent and other limitations promulgated under Section 1311. Petitioner suggests, however, that the Clean Water Rule does not impose "limitation[s]" within the meaning of Section 1369(b)(1)(E) because the Rule is not "self-

executing," but instead "operates in conjunction with other sections scattered throughout the Act." Pet. Br. 29 (quoting Pet. App. 31a (Griffin, J., concurring in the judgment)). Judicial review under Section 1369(b)(1)(E), however, is not confined to direct or freestanding limitations, but instead extends broadly to "*any* effluent limitation or *other limitation*." 33 U.S.C. 1369(b)(1)(E) (emphasis added).

Other aspects of the statutory scheme further belie petitioner's view that Section 1369(b)(1)(E) reaches only self-executing or direct limitations. Many of the numerical and qualitative limitations that petitioner acknowledges are reviewable under Section 1369(b)(1)(E) are "not self-executing," but instead "achieve their bite only after they have been incorporated into NPDES permits." *Texas Oil & Gas Ass'n* v. *United States EPA*, 161 F.3d 923, 928 (5th Cir. 1998). For example, the CWA directs EPA to issue regulations that "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available" for classes of point sources. 33 U.S.C. 1314(b)(1)(A). EPA rules identifying "the degree of effluent reduction attainable" through best practices, *ibid.*, are not self-executing, however; they are instead "made binding on individual dischargers" only through NPDES permits. *Texas Oil*, 161 F.3d at 928; see *American Petroleum Inst.* v. *EPA*, 661 F.2d 340, 344 (5th Cir. 1981) (explaining that NPDES permits "transform[] generally applicable effluent limitations . . . into obligations (including a timetable for compliance) of the individual discharger") (citation and internal quotation marks omitted).

If Congress had authorized court of appeals review only of "direct" or "self-executing" limitations, moreover, a rule's reviewability could turn not on the rule's substantive effect, but on how the rule was phrased. For example, the agencies could have issued a rule stating that, except as provided in other regulatory provisions governing the issuance of permits, "no person may add any pollutant from a point source to any of the following waters." That wording would have conveyed even more starkly the centrality of the covered-waters definition to an understanding of the "limitations" that the rule placed on regulated parties' conduct. Taken together, however, the Clean Water Rule and the regulatory provisions that set out effluent limitations constitute the substantive equivalent of that "self-executing" or "direct" limitation. See 80 Fed. Reg. at 37,054 ("Programs established by the CWA * * * such as the section [1342] National Pollutant Discharge Elimination System * * * permit program * * * all rely on the definition of 'waters of the United States.'").

Petitioner also argues (Pet. Br. 29-30; see Waterkeeper Resps. Br. 13, 14 n.2) that, under the interpretive canons of *ejusdem generis* and *noscitur a sociis* and the rule against superfluities, the phrase "other limitation," 33 U.S.C. 1369(b)(1)(E), should be understood to reach only "effluent-like" limitations. Pet. Br. 39. Petitioner's reliance on those canons is misplaced.

The *ejusdem generis* canon addresses the interpretation of a general phrase that "follows a list of specifics" from which it is possible to infer some shared property. *James* v. *United States*, 550 U.S. 192, 199 (2007), overruled on unrelated grounds by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). In contrast, a phrase that

is "disjunctive, with one specific and one general category," "does not lend itself to application of the canon." *Ali*, 552 U.S. at 225; see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 206 (2012) (Scalia & Garner) (stating that "*ejusdem generis* generally requires at least two words to establish a genus—before the *other*-phrase"—and that "'[t]heaters and other places of public entertainment' does not invoke the canon"). Petitioner cites (Br. 30) *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), for its articulation of the *ejusdem generis* canon. The statutory provision in that case, however, contained a general term following a list of specific terms from which it was possible to infer a shared property, and the Court described the canon as coming into play "where general words follow specific *words* in a statutory enumeration." *Id.* at 114-115 (brackets and citation omitted; emphasis added). Petitioner identifies no decision of this Court suggesting, contrary to *Ali*, that *ejusdem generis* applies when a catch-all follows a single specific example.

Petitioner's reliance on the related canon of *noscitur a sociis* is similarly misplaced. Under the principle that a word's meaning is "known from its associates," "[c]ourts may clarify the meaning of doubtful words in an ambiguous statute by reference to other associated words and phrases." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:16, at 353 (rev. 7th ed. 2014). Thus, if a statute refers to "'tacks, staples, nails, brads, screws, and fasteners,' it is clear from the words with which they are associated that the word *nails* does not denote fingernails and that *staples* does not mean reliable and customary food items." Scalia & Garner 196. But the

canon is used only to construe terms that are ambiguous, not to alter the meaning of words that are simply broad. See, *e.g.*, *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 520 (1923) (noting that "[*n*]*oscitur a sociis* is a well established and useful rule of construction where words are of obscure or doubtful meaning and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words").

Even if "other limitation" were an ambiguous term, *noscitur a sociis* would not aid petitioner. That canon sheds light on the meaning of a statute that contains a "string of statutory terms," *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378-380 (2006), because when "several items in a list share an attribute," that fact "counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). But when a provision lists just two items, this Court has declined to hold that "pairing a broad statutory term with a narrow one shrinks the broad one," explaining that "*noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren Co.*, 547 U.S. at 379-380; see *id.* at 379 (explaining that it is not possible "to extrapolate a common feature from what amounts to a single item"). Within Section 1369(b)(1)(E), moreover, the terms "effluent limitation" and "other limitation" both refer to limitations that arise under the enumerated statutory sections. There is no logical reason to view the intended common attribute of the two terms as the "effluent-like" character of the limitations they reference, rather than simply the connection to Section 1311, 1312, 1316, or 1345 that Section 1369(b)(1)(E) explicitly requires. See *Ali*, 552 U.S. at

225, 226 (concluding that *noscitur a sociis* did not support limiting the catch-all portion of "any officer of customs or excise or any other law enforcement officer" because the statutory language was not "inconsistent with the conclusion that 'any other law enforcement officer' sweeps as broadly as its language suggests").

Petitioner further argues that "other limitation" should be construed narrowly because "[a] contrary reading would render superfluous the specific words *effluent limitation*." Pet. Br. 30 (brackets, citation, and internal quotation marks omitted). Congress could have replaced those two phrases with a single broad term such as "any limitation." But Congress routinely pairs a specific example with an expansive phrase, for emphasis or clarity. This Court has often addressed such provisions and has given them their natural reading. See, *e.g.*, *Buck* v. *Davis*, 137 S. Ct. 759, 777-778 (2017); *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 562 U.S. 277, 280-281 (2011); *Ali*, 552 U.S. at 224, 226; *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 587-589 (1980). Petitioner identifies no decision suggesting that the possibility of more concise phrasing amounts to surplusage.

In any event, even if some interpretive canon counseled in favor of reading Section 1369(b)(1)(E) as reaching only effluent limitations and "limitations directly related to effluent limitations" (Pet. Br. 30), a rule setting the geographic scope of effluent limitations falls squarely within the latter category. Indeed, such a rule bears a closer connection to effluent limitations than many of the limitations that petitioner concedes are reviewable under Section 1369(b)(1)(E). See *id.* at 31 (offering as examples of purportedly effluent-like rules

those regulations "that direct the point source to engage in specific types of activity" or that "promulgate a design, equipment, management practice, or operational standard") (brackets and citations omitted).

Petitioner is also wrong in contending (Br. 32-33) that the Clean Water Rule does not impose effluent or other limitations "under Section 1311." Petitioner observes that the term "waters of the United States" does not appear in Section 1311. Pet. Br. 32; see State Resps. Br. 23-24; Waterkeeper Resps. Br. 14-15. But "waters of the United States" is part of the definition of a term that does appear in Section 1311. See 33 U.S.C. 1311 (forbidding "discharge of any pollutant" except under specified conditions); 33 U.S.C. 1362(12) (defining "discharge of a pollutant" as adding "any pollutant to navigable waters from any point source"); 33 U.S.C. 1362(7) (defining "navigable waters" to include "waters of the United States"). By establishing the scope of the Section 1311 term "discharge of any pollutant," the Clean Water Rule's legal and practical effect is to make effluent and other limitations under Section 1311 applicable to the waters that the Rule covers. Nothing in Section 1369(b)(1)(E) suggests that the proper forum for judicial review depends on whether the agency achieves this result by issuing a regulatory definition of the term "waters of the United States," or by promulgating a parallel rule that achieves the same result by defining the geographic scope of the Section 1311 phrase "discharge of any pollutant."

Petitioner also contends (Br. 34) that the Clean Water Rule does not impose effluent or other limitations "'under section 1311, 1312, 1316, or 1345' because it is a definitional rule that 'applies across the entire Act'" (citations omitted). Section 1369(b)(1)(E) is not rendered

inapplicable, however, simply because the Clean Water Rule affects the implementation of CWA provisions *in addition to* those enumerated in Section 1369(b)(1)(E) itself. The Clean Water Rule imposes limitations under Section 1311, even if it imposes limitations under other CWA provisions as well.

Petitioner and respondents in support of petitioner suggest (Pet. Br. 32-33, 37-38; State Resps. Br. 38-39, 44-45; Waterkeeper Resps. Br. 40-41; Utility Resp. Br. 20-21) that, if the limitations they would read into Subparagraph (E) are not imposed, "[n]early any EPA action" would be reviewable under Section 1369(b)(1)(E). Pet. Br. 37. That is incorrect. Many EPA actions are not reviewable under Section 1369(b)(1)(E) because they do not impose effluent or other limitations under Section 1311 or under any of the three other enumerated CWA provisions. For example, Subparagraph (E) does not authorize court of appeals review of EPA rules governing hazardous substances, 33 U.S.C. 1321 (2012 & Supp. II 2014); vessel wastes, 33 U.S.C. 1322(b); or construction grants, 33 U.S.C. 1281-1301 (2012 & Supp. II 2014). See *NRDC, Inc.* v. *U.S. EPA*, 673 F.2d 400, 404 n.14 (D.C. Cir.) (noting government's submission that these classes of action were not reviewable under Subparagraph (E)), cert. denied, 459 U.S. 879 (1982). It does not reach EPA decisions approving States' individual control strategies. See *Lake Cumberland Trust, Inc.* v. *United States EPA*, 954 F.2d 1218, 1221, 1223 (6th Cir. 1992) (collecting cases); see also 33 U.S.C. 1314(*l*). It does not reach EPA's decisions approving state water-quality standards. See, *e.g.*, *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 517-518 (2d Cir. 1976). And, contrary to petitioner's suggestion (Br. 37-38), it does not reach EPA administrative enforcement orders

under Section 1319(a)(1), such as the order at issue in *Sackett* v. *EPA*, 566 U.S. 120 (2012). While EPA might issue an enforcement order if it concluded that a landowner was violating Section 1311 (or another provision of the CWA), an enforcement order does not itself approve or promulgate effluent or other limitations under Section 1311 or any of the other provisions listed in Subparagraph (E). Giving Subparagraph (E) the scope that its text commands thus does not render the provision limitless. See *NRDC*, 673 F.2d at 404 n.14 (rejecting the same argument).

2. The Clean Water Rule is also reviewable under Section 1369(b)(1)(F)

Section 1369(b)(1)(F) authorizes court of appeals review of EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). In *Crown Simpson*, *supra*, this Court considered whether Section 1369(b)(1)(F) authorized direct court of appeals review of EPA's veto of an NPDES permit issued by a state authority. See 445 U.S. at 196. The court of appeals had concluded that it lacked jurisdiction because "EPA's veto of a state-issued permit did not constitute 'issuing or denying' a permit." *Ibid.* The concurring judge on that court, by contrast, expressed the view that reading Section 1369(b)(1)(F) to encompass actions that are "functionally similar" to denial of a permit "best comport[s] with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Ibid.*

This Court summarily reversed, "agree[ing] with the concurring opinion" in the court of appeals. *Crown Simpson*, 445 U.S. at 196. It held that Section 1369(b)(1)(F) conferred jurisdiction over the veto, which had "the pre-

cise effect" of a permit denial. *Ibid.* The Court reasoned that a contrary approach "would likely cause delays in resolving disputes under the Act" and would create "a seemingly irrational bifurcated system" in which "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197.

Under the functional interpretive approach utilized by this Court in *Crown Simpson*, the Clean Water Rule is reviewable under Section 1369(b)(1)(F). An NPDES permit may be issued only for activity that involves a discharge of pollutants to "waters of the United States," 33 U.S.C. 1342, 1362(7) and (12). A rule governing whether particular bodies of water constitute "waters of the United States" therefore controls whether permits may or may not be issued for discharges to those bodies of water. And because permits are required only for discharges to waters of the United States, petitioner's narrow construction of Section 1369(b)(1)(F) would result in the "seemingly irrational bifurcated system" of review that the *Crown Simpson* Court construed the statute to avoid. 445 U.S. at 197. A challenge to an EPA determination that a particular site contains "waters of the United States" would be reviewable directly in a court of appeals under Section 1369(b)(1)(F) if that determination was made in an individual NPDES permitting decision. But EPA's resolution of the same question on a more categorical basis through the Clean Water Rule would instead be reviewed through suits brought under the APA and filed in district courts across the country.

Because that approach is contrary to the principles in *Crown Simpson*, courts of appeals have generally construed Section 1369(b)(1)(F) to cover rules that delineate EPA's jurisdiction to issue permits. See *National Cotton Council* v. *United States EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (rule providing that pesticides applied in accordance with a federal statute are exempt from permitting requirements), cert. denied, 559 U.S. 936 and 130 S. Ct. 1505 (2010); *NRDC, Inc.* v. *United States EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992) (rule specifying what types of stormwater discharges require permits); *American Mining Cong.* v. *United States EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (rule requiring permits for certain stormwater discharges); *NRDC, Inc.* v. *U.S. EPA*, 656 F.2d 768, 775-776 (D.C. Cir. 1981) (rule governing whether the agency may grant permits with certain types of variances); see also, *e.g.*, *National Pork Producers Council* v. *United States EPA*, 635 F.3d 738, 749-751 (5th Cir. 2011); but see *Friends of the Everglades* v. *United States EPA*, 699 F.3d 1280, 1287-1288 (11th Cir. 2012) (holding that court of appeals lacked jurisdiction under Subparagraph (F) to consider a rule providing that no NPDES permit was required for certain transfers of water from one body to another), cert. denied, 134 S. Ct. 421 and 134 S. Ct. 422 (2013).

Petitioner's contrary arguments lack merit. Petitioner seeks (Br. 24) to confine *Crown Simpson* to its facts, asserting that the Court "merely held that EPA's veto of a state-issued permit is the denial of a Section 1342 permit covered by Subsection (F)." But *Crown Simpson*'s holding consists not only of its "result," but also of its "rationale." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66-67 (1996) (compiling authority).

Petitioner's argument disregards *Crown Simpson*'s reasoning, including the Court's conclusion that Subparagraph (F) reaches decisions that are "functionally similar" to permit issuance or denial and its rejection of "a seemingly irrational bifurcated system" under which decisions that are functional equivalents would be routed to different courts. 445 U.S. at 196, 197. Particularly in light of the "special force" of stare decisis "in the area of statutory interpretation," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989), and the "influential decisions" of the courts of appeals (Pet. Br. 39) that have long relied on this Court's guidance concerning Subparagraph (F), there is no sound reason to abrogate the *Crown Simpson* framework.

Petitioner also argues that the canon against superfluity provides a ground to overturn the *Crown Simpson* approach. See Pet. Br. 25-27; see also State Resps. Br. 36-38. That argument rests on petitioner's view that, if Subparagraph (F) of Section 1369(b)(1) encompasses the Clean Water Rule, it must likewise encompass the categories of EPA action that are enumerated in Section 1369(b)(1)'s other subparagraphs. See Pet. Br. 25-26 (stating that, "[u]nder [Judge McKeague's] approach, most of the other designations Congress made in Section 1369(b) would be unnecessary because they would be covered by Subsection (F)"). That argument lacks merit.

A construction of Section 1369(b)(1)(F) that reaches decisions functionally similar to permit grants or denials naturally reaches rules that govern whether EPA has jurisdiction to issue or deny a permit. But it does not clearly reach "standard[s] of performance," "pretreatment standard[s]," "effluent limitation[s]," and "individual control strateg[ies]" for toxic pollutants—

the types of EPA action that Congress made reviewable in 33 U.S.C. 1369(b)(1)(A), (C), (E), and (G). Those rules set standards that EPA and state authorities must also incorporate in their permits, see 33 U.S.C. 1317(d), but they do not dictate whether a permit may be issued at all. EPA's decision whether to authorize a State's permitting program under 33 U.S.C. 1369(b)(1)(D) is likewise entirely distinct from a decision whether to issue or deny a permit for a particular discharge of pollutants. Thus, even if Subparagraph (F) arguably encompasses some of the EPA actions enumerated in Section 1369(b)(1)'s other subparagraphs, those provisions serve a useful purpose by "remov[ing] any doubt" that courts of appeals have jurisdiction to review those actions. *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 383-384 (2013) (explaining that provisions are not superfluous when they remove doubt about an issue); *Ali*, 552 U.S. at 226 (same).

In any event, "[t]he canon against surplusage is not an absolute rule," *Marx*, 568 U.S. at 385, because "[r]edundancies across statutes are not unusual events in drafting," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see Scalia & Garner 176-177. Given the complexity of the CWA, the interconnectedness of its provisions, and the many classes of decisions that Congress routed to the court of appeals under Section 1369(b)(1), significant overlap among the categories of actions covered by Section 1369(b)(1) would hardly be surprising. Petitioner identifies no persuasive reason to depart from the pragmatic approach to Subparagraph (F) that this Court adopted decades ago in *Crown Simpson* and that has shaped lower-court case law since that time.

B. Petitioner's Reading Of Section 1369(b)(1) Cannot Be Reconciled With The Provision's Structure And Purpose

By routing cases directly to the courts of appeals, and by requiring that any challenge to the enumerated EPA actions must be brought within 120 days, Section 1369(b)(1) facilitates quick and orderly resolution of disputes concerning the legality of important rules governing the scope of a regulatory scheme. See *Harrison*, 446 U.S. at 593 ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."); *Crown Simpson*, 445 U.S. at 196, 197 (agreeing that Section 1369(b) serves "the congressional goal of ensuring prompt resolution of challenges to EPA's actions," and rejecting an interpretation that "would likely cause delays in resolving disputes under the Act"). In addition, as then-Judge Ginsburg explained, "initial review in a court of appeals" helps to produce "[n]ational uniformity, an important goal in dealing with broad regulations." *NRDC*, 673 F.2d at 405 n.15; see *Virginia Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 451 (4th Cir. 1977) (*VEPCO*) (observing that "the jurisdictional scheme of the Act * * * in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards").

In each of its decisions interpreting Section 1369(b)(1), this Court has construed the provision to afford this form of expedited review to a coherent class of EPA actions, so that intertwined agency actions are routed through the same channels. The petitioners in *E.I. du Pont* argued that Section 1369(b)(1) should be interpreted to permit direct court of appeals review of

grants and denials of individual variance permits under Section 1311, but not of "effluent limitations for classes and categories of existing point sources." 430 U.S. at 136. In rejecting that approach, the Court explained that the petitioners' reading of the jurisdictional provision "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.* And in resolving a different question concerning EPA's statutory authority "to issue regulations establishing effluent limitations for classes of plants," *id.* at 124, the Court explained that it would be "highly anomalous" if the agency's new-source regulations "were directly reviewable in the Court of Appeals," *id.* at 127-128, while its existing-source standards "based on the same administrative record were reviewable only in the District Court," *id.* at 128. The Court stated that "[t]he magnitude and highly technical character of the administrative record involved with these regulations makes it almost inconceivable that Congress would have required duplicate review in the first instance by different courts." *Ibid.*

Two years later, the Court in *Crown Simpson* again construed Section 1369(b)(1) to avoid irrational disparities in the review of similar agency actions. The Court's holding that Section 1369(b)(1)(F) should be interpreted to reach not only EPA's own issuance or denial of a permit, but also the "functionally similar" step of vetoing a state permit, rested on that point. 445 U.S. at 196. The Court explained that the court of appeals' contrary approach was flawed because it would mean that "fortuitous circumstance[s]"—there, whether a State

had been authorized to issue NPDES permits—would control the "level[] of the federal-court system" at which comparable actions were reviewed. *Id.* at 196-197. The Court also noted that "the additional level of judicial review" that would occur in the district courts "would likely cause delays in resolving disputes under the Act." *Id.* at 197. The Court concluded that, "[a]bsent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system." *Ibid.*[5]

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[5] In other statutory contexts as well, this Court has read comparable jurisdictional provisions to avoid bifurcated review of related agency actions. In *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985), the Court held that a provision channeling certain Merit Systems Protection Board decisions to the Federal Circuit should be interpreted to encompass claims of retirees as well as those of active employees because the interests favoring direct court of appeals review were equally present for both classes of cases. See *id.* at 796. The Court concluded that the jurisdictional provision reflected the intent "to abolish the needless practice of reviewing civil service actions on the same criteria at two judicial levels." *Id.* at 798. In light of that congressional policy choice, the Court saw no reason why Congress would have intended one class of claims—those of retirees—to "be reviewed for legal and procedural error first by the Claims Court or a district court, and then all over again by the Federal Circuit." *Ibid.* Citing *Crown Simpson*, the Court stated that it "cannot assume that Congress intended to create such a bizarre jurisdictional patchwork." *Id.* at 799; see *id.* at 799 n.37. The Court has relied on the same principle in construing the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 742 (1985) (avoiding "a seemingly irrational bifurcated system" in which "some final orders in licensing proceedings [would] receiv[e] two layers of judicial review and some receiv[e] only one") (citation omitted), and the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, *Foti* v. *Immigration & Naturalization Serv.*, 375 U.S. 217, 232 (1963) (construing statute to avoid "[b]ifurcation of judicial review of deportation proceedings").

Petitioner's reading of Section 1369(b)(1)(E) and (F) would create the type of irrational bifurcation that the Court in *E.I. du Pont* and *Crown Simpson* sought to avoid. Petitioner would construe Section 1369(b)(1) as vesting the courts of appeals with jurisdiction to review EPA regulations setting numerical or qualitative effluent limitations, while authorizing district courts throughout the country to review regulations governing the same effluent limits' geographic scope. That bifurcation would hinder regulated parties' efforts to obtain prompt clarification of their responsibilities under the CWA. See *Crown Simpson*, 445 U.S. at 196 (noting that Section 1369(b)(1) is designed to facilitate speedy resolution of the meaning of covered provisions); *NRDC*, 673 F.2d at 405 n.15 (Ginsburg, J.) ("National uniformity is an important goal in dealing with broad regulations.").

A similar irrational bifurcation would result from routing to the courts of appeals any "waters of the United States" determinations that could be made in the context of individual permitting decisions, see 33 U.S.C. 1369(b)(1)(F), while sending to the district courts the rules that govern those permitting determinations. See pp. 31-33, *supra*. That division would produce "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136. "Absent a far clearer expression of congressional intent," Section 1369(b) should not be read "as creating

such a seemingly irrational bifurcated system." *Crown Simpson*, 445 U.S. at 197.[6]

Petitioner makes no meaningful attempt to reconcile its position with the interpretive principles set out in *E.I. du Pont* and *Crown Simpson*. Petitioner offers (Br. 50-55) several policy arguments regarding the value of decentralized litigation, principally emphasizing the "doctrinal dialogue that occurs when a court * * * addresses the legal reasoning of another and reaches a contrary conclusion." Pet. Br. 51 (citation omitted). Those arguments do not explain the bifurcation that petitioner's approach would create. A Congress that placed great weight on doctrinal dialogue might have routed to district courts *all* litigation concerning EPA's administration of the CWA. But petitioner offers no reason why Congress would have distinguished for this purpose between the numerical aspect of effluent limitations and the geographic aspect of those limits.

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[6] The different institutional competencies of trial and appellate courts do not support that bifurcation. The Clean Water Rule—like an effluent limitation—is "[a] broad, policy-oriented rule[]," *NRDC*, 673 F.2d at 405, that is reviewed without reliance on "[t]he factfinding capacity of the district court," *Florida Power & Light Co.*, 470 U.S. at 744. Under petitioner's approach, each district court where suit has been filed—more than ten courts so far (Pet. Br. vi)—would review an administrative record of more than 350,000 pages, 15-3751 C.A. Doc. 122 (Oct. 11, 2016), only to have that inquiry repeated by any court of appeals to which an appeal was taken. See *E.I. du Pont*, 430 U.S. at 128 (considering it "almost inconceivable" that Congress in enacting Section 1369(b)(1) would have intended multiple courts to engage in "duplicate review" of an extensive "and highly technical" administrative record); *Florida Power & Light Co.*, 470 U.S. at 744 (explaining that, when agency action is reviewed on an administrative record, "[p]lacing initial review in the district court * * * ha[s] the negative effect * * * of requiring duplication of the identical task in the district court and in the court of appeals").

Petitioner also suggests that this Court should eschew "functional" considerations altogether (Br. 45), and simply treat Section 1369(b) as sweeping in an "odd or arbitrary" collection of agency actions whose boundaries are "hard to fathom" (Br. 45-46). That proposal is inconsistent with this Court's decisions in *Crown Simpson* and *E.I. du Pont*, which treated functional considerations as an important guide to interpreting Section 1369(b), and which have undergirded decades of decisions in the lower courts. By treating as irrelevant the structural and purposive considerations that courts have heretofore used to resolve ambiguities in Section 1369(b)(1), petitioner's approach would essentially render nugatory that substantial body of case law, and it would hinder judicial efforts to resolve future jurisdictional disputes in a consistent and principled fashion.

C. The CWA's Legislative History Supports The Court Of Appeals' Assertion Of Jurisdiction To Review The Clean Water Rule

1. The House and Senate debates that preceded Section 1369(b)(1)'s enactment reflected an understanding that the provision would generally govern the nationwide rules that EPA promulgated to implement the CWA. Both the House and Senate versions of the bill applied to substantially the same basic list of agency actions—a list that was virtually identical to the list that appeared in Section 1369(b)(1) as enacted in 1972. Compare CWA, Pub. L. No. 92-500, § 509(b)(1), 86 Stat. 892, with H.R. 11896, 92d Cong., 1st Sess. § 509(b) (1971), and S. 2770, 92d Cong., 1st Sess. § 509(b) (1971). The House version would have routed review of the enumerated agency actions to the district courts, while the Senate version would have authorized review of some listed actions by the D.C. Circuit and others by regional courts of

appeals. See *ibid.* In the reconciliation process, Congress settled on an intermediate approach, under which all enumerated EPA actions were made reviewable by the regional circuits. Conference Report 147-148.

The Senate Report stated that Section 1369(b)(1) would authorize expedited, centralized review of the "requirements, standards and regulations" that EPA established under the Act. Senate Report 84-85. It explained that there were "uncertainties" under existing law about the availability of review for "administratively developed and promulgated requirements, standards and regulations," and that Section 1369 would "specifically provide for such review within controlled time periods" in particular appellate courts. *Ibid.* Summarizing the provision, the Senate Report stated that "[a]ny suit against a Federal standard" under the Act would be routed to the D.C. Circuit, while "[s]uits for review of a Section 402 permit" would be filed in "the Court of Appeals for the appropriate circuit." *Id.* at 84.

Although the House version provided for review in district courts, the House Report likewise described proposed Section 1369(b)(1) as establishing a broadly applicable framework for resolution of disputes concerning EPA's implementation of the Act. It stated that, "with the number and complexity of administrative determinations that [the Act] requires[,] there is a need to establish a clear and orderly process for judicial review." House Report 136. It also spoke broadly of Section 1369's relationship to that goal, stating that "Section [1369] will ensure that administrative actions are reviewable, but that the review will not unduly impede enforcement." *Ibid.*

The Conference Report confirmed that Congress understood Section 1369(b)(1) as broadly encompassing

rulemakings that would implement the Act's limitations. It described the Senate version as "requir[ing] that any suit against a Federal standard" would be filed in the D.C. Circuit, subject to the proviso that "[s]uits for review of the Administrator's action in approving or promulgating any effluent limitation under section 301 or 302 or issuing or denying a permit under section 402 of this Act would have to be filed in the Court of Appeals for the appropriate circuit." Conference Report 147. And it described the House version of the provision as "basically the same * * * except that review of any of the Administrator's actions" would be conducted by district courts. *Ibid.* The Conference Report explained that the conference version was "the same as the Senate bill and the House amendment" except that, as relevant here, "[j]udicial review is to be had in the circuit court of appeals for the judicial district in which the interested person resides or transacts business, and the time for application for judicial review is extended from 30 to 90 days." *Id.* at 147-148. The pertinent legislative Reports all reflect an understanding of the judicial-review provision that is not compatible with petitioner's view, under which the statute would provide for appellate review of an "odd or arbitrary" (Pet. Br. 46) selection of agency determinations, but not of closely related determinations that play an equally integral role in implementing the CWA.

To be sure, insofar as the Senate and Conference Reports suggested that Section 1369(b)(1) encompasses *every* nationwide regulation that the Administrator issues under the CWA, their language was imprecise. Subparagraphs (E) and (F) of Section 1369(b)(1) are naturally read to cover regulations that construe and implement the Act's prohibition on unauthorized

pollutant discharges and its attendant NPDES permitting program—the centerpieces of the Act. See, *e.g.*, *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981); *NRDC, Inc.* v. *U.S. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). But Section 1369(b)(1) does not authorize court of appeals review of EPA regulations that implement some more peripheral CWA provisions, such as research programs, 33 U.S.C. 1251-1275 (2012 & Supp. III 2015); the funding of treatment facilities, 33 U.S.C. 1281-1301 (2012 & Supp. II 2014); and grants to the States, 33 U.S.C. 1381-1387 (2012 & Supp. II 2014).

The fact that the legislative Reports used imprecise language, however, does not render them irrelevant to the interpretive question presented here. A judicial-review provision that excluded the Clean Water Rule, which defines the geographic reach of the CWA's core provisions and thus of the NPDES permitting scheme, could not even loosely be described as covering the "requirements, standards and regulations" that EPA establishes under the Act, Senate Report 84-85, or as conferring appellate jurisdiction over "any suit against a Federal standard," Conference Report 147. Nor can petitioner's view of the statute as dividing review of intertwined regulatory provisions between different levels of the judicial system be reconciled with Congress's stated objective of establishing "a clear and orderly process for judicial review" that was necessary in light of "the number and complexity of administrative determinations that [the Act] requires." House Report 136.

2. The courts of appeals have understood this Court's decisions in *Crown Simpson* and *E.I. du Pont* as giving "a practical rather than a cramped construction" to Section 1369(b)(1), and they have largely

applied the same functional analysis in resolving ambiguities in that judicial-review provision. *NRDC*, 673 F.2d at 405; see *VEPCO*, 566 F.2d at 450; Pet. Br. 39; pp. 31-32, *supra*. In 1987, Congress amended Section 1369(b)(1) without narrowing its scope. See Water Quality Act of 1987, Pub. L. No. 100-4, Tits. III-V, §§ 308(b), 406(d)(3), 505(a) and (b), 101 Stat. 39, 73, 75-76.[7] The fact that Congress amended Section 1369(b)(1) after the framework of *Crown Simpson* and *E.I. du Pont* was in place, while giving no indication that it disapproved either the functional approach generally or its specific application to rules that govern the CWA permitting process, provides an additional justification for adhering to that framework. See, *e.g.*, *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009).

3. Petitioner relies in part (Br. 42-43) on Congress's decision not to enact a 1977 proposal to centralize review under Section 1369(b)(1) in the D.C. Circuit. In fact, the debates over that proposal confirm Congress's understanding that Section 1369(b)(1) authorizes court of appeals review of nationwide regulations, like the Clean Water Rule, that govern the scope of effluent and other limitations under the Act.

Petitioner relies (Br. 42) on the Senate's rejection of a floor amendment introduced by Senator Kennedy,

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[7] The 1987 amendments to Section 1369(b)(1) made additional EPA actions reviewable in the courts of appeals. Congress also added a new venue-selection procedure to Section 1369(b) to address situations in which challenges to an agency action were brought in multiple courts of appeals. Water Quality Act of 1987, Pub. L. No. 100-4, Tits. III-V, §§ 308(b), 406(d)(3), 505(a) and (b), 101 Stat. 39, 73, 75-76.

which sought to implement a proposal of the Administrative Conference of the United States to centralize review of nationwide CWA regulations in the D.C. Circuit. 41 Fed. Reg. 56,767 (Dec. 30, 1976); see 123 Cong. Rec. 26,756 (1977) (statement of Sen. Kennedy); *id.* at 26,760-26,761 (same). The Administrative Conference explained that its proposal would move review of nationwide standards to the D.C. Circuit *from the regional circuits*—not from the district courts. 41 Fed. Reg. at 56,767. Thus, the Administrative Conference described Section 1369(b) as "provid[ing] that all standards promulgated under [the CWA] by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business." *Ibid.* The Administrative Conference recommended that "[a]ll national standards under the [CWA]" should instead be reviewed in the D.C. Circuit, while "all other regulations, standards, and determinations that are reviewable in the court of appeals under the [CWA] should be in the circuit containing the affected state or facility." *Ibid.*[8]

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[8] The Administrative Conference also described the statute as containing provisions that were "ambiguous," and recommended that Section 1369(b) be amended to specifically mention several additional types of EPA actions in order to "make clear that [they] are reviewable in the courts of appeals." 41 Fed. Reg. at 56,767-56,768 (addressing "[p]romulgation or approval of water-quality standards under Section 303," "[p]romulgation of effluent guidelines under section 304," "[p]romulgation of regulations governing the discharge of oil or hazardous substances under section 311(b)," and "[p]romulgation of standards for marine sanitation devices under Section 312 or determinations that a state may completely prohibit the discharge from all vessels of any sewage under Section 312(f)").

With respect to the proper forum for reviewing nationwide EPA regulations governing the scope of the CWA's coverage, the debate concerning the proposed amendment reflected the participating Senators' understanding that the choice before them was not between circuit and district courts, but between the D.C. Circuit and the regional courts of appeals. Senator Kennedy described his proposal as one that would "centralize judicial review of national regulations" in the D.C. Circuit, because in the absence of such centralization, "[t]he EPA has been forced to repeatedly litigate the same issues in different circuits." 123 Cong. Rec. at 26,754-26,755; see *id.* at 26,757 ("[W]hat we are having is a proliferation of different cases in different circuits around the country."). Opponents of the amendment argued that EPA's nationwide regulations should be reviewed in the regional courts of appeals. *Id.* at 26,758 (statement of Sen. Scott) ("[S]omeone who is affected by a rule that has been made by the administrator should not have to come to Washington to be heard on the matter. We have our various judicial circuits, and I think that is one of the reasons for having our circuits. * * * [Y]ou should be able to go to the circuit court within your own circuit in all instances."); *id.* at 26,760 (statement of Sen. Stafford) ("I agree with the argument that this is not the time to take another step in dismembering the U.S. circuit courts of appeal[s] in this country by bringing another matter to Washington for exclusive determination."); see also *ibid.* (statement of Sen. Randolph); *id.* at 26,759 (statement of Sen. Thurmond).

Indeed, even the lone floor statement that petitioner invokes (see Br. 42-43) reflects the understanding that nationwide regulations like the Clean Water Rule would

generally be reviewed in the circuit courts. Senator Domenici began with a general statement—quoted in part by petitioner (*ibid.*)—that Congress should not "in bits and pieces, decide that the circuit court system in this country has no validity," including through such steps as abolishing the circuit courts entirely, or "nickel and dim[ing] the district courts of the United States out of business." 123 Cong. Rec. at 26,759. But when he turned to the bill at hand, Senator Domenici made plain that he also regarded the question before the Senate to be whether nationwide CWA regulations like the Clean Water Rule should be reviewed in regional circuits or in the D.C. Circuit. Thus, Senator Domenici stated that EPA's support for the proposed legislation reflected that the federal government did "not like how the circuit courts have ruled on matters of national interest." *Ibid.* He expressed the view that "[t]hese cases should be heard in the circuit courts," and that "there is just as much justification to let it be the circuit court that has California or look at the cases that have been filed and see where most of the constituents come from and choose the one that has had the most cases, and say that circuit will have it." *Ibid.* No Senator argued, as a ground for opposing Senator Kennedy's amendment, that review of such nationwide regulations should occur in the district courts.

In sum, from Section 1369(b)(1)'s enactment onward, Congress has understood that the provision would sweep broadly. That history provides additional reason that Subparagraph (E) should be given its full textual sweep, applying to any rule that promulgates any limitation under Section 1311. And it provides additional reason that Subparagraph (F) should be construed pragmatically, in accord with this Court's approach in

Crown Simpson, to reach rules that control whether EPA may issue an NPDES permit at all.

D. When Congress Has Authorized Direct Court Of Appeals Review Of Federal Agency Action, Ambiguities As To The Scope Of That Authorization Should Be Resolved In Favor Of Broader Coverage

In *Florida Power & Light Co.*, this Court addressed the question whether statutory provisions authorizing direct court of appeals review of certain Nuclear Regulatory Commission (NRC) decisions encompassed a particular type of order. See 470 U.S. 729, 731, 734-735 (1985). The Court explained that, when such a direct-review provision exists, "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts," this Court "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Id.* at 745. Courts of appeals have accordingly held that, "when there is a specific statutory grant of jurisdiction to the courts of appeals, it should be construed in favor of review by the court of appeals." *NRDC* v. *Abraham*, 355 F.3d 179, 193 (2d Cir. 2004); see, *e.g.*, *General Elec. Uranium Mgmt. Corp.* v. *United States Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985) ("[I]t frequently has been noted that, in administrative appeals, 'where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter.'") (citation omitted); 33 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8292 (2006).

Petitioner and respondents in support of petitioner (Pet. Br. 48-50; State Resps. Br. 43-44, 47; Agrowstar Resps. Br. 6; Waterkeeper Resps. Br. 18, 27, 36) argue

that Section 1369(b)(1) should instead be construed narrowly to avoid due-process or rule-of-lenity concerns. They emphasize the CWA's directive that "[a]ction of the Administrator with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2). They argue that Section 1369(b)(1) should be construed narrowly so as to reduce the range of challenges that defendants in enforcement proceedings will be barred from asserting.

This potential effect on future (hypothetical) enforcement proceedings does not justify narrowing Section 1369(b)(1). See *Harrison*, 446 U.S. at 592 n.9 (rejecting parallel argument for narrow construction of the provision for review of agency action in the courts of appeals in the Clean Air Act, 42 U.S.C. 7401 *et seq.*). In and of itself, direct court of appeals review of the Clean Water Rule raises no conceivable due-process or rule-of-lenity concern. Any such concern will arise, if at all, only if and when the defendant in a future enforcement proceeding argues that he cannot properly be denied the opportunity to challenge an EPA rule on which the enforcement action is based. As in *Harrison*, this Court should give Section 1369(b)(1) the meaning that follows from the statute's text, structure, and purposes, and leave the preclusion challenge of a possible future defendant to "await another day." 446 U.S. at 593 n.9.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 33 U.S.C. 1369(b) provides in pertinent part:

Administrative procedure and judicial review

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to

judicial review in any civil or criminal proceeding for enforcement.

* * * * *

2. 33 U.S.C. 1311 provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is

technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, §21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water

supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and

if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection,

where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of

73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of

this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source;

and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g)

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[1] So in original. Probably should be "than".

of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) COMPLIANCE REQUIREMENTS UNDER SUBSECTION (g).—

(A) EFFECT OF FILING.—An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) EFFECT OF DISAPPROVAL.—Disapproval of an application for a modification under subsection (g) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) EXTENSION OF APPLICATION DEADLINE.—

(A) IN GENERAL.—In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of this section of the requirements of subsection (b)(1)(B) of this section with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) APPLICATION.—An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will—

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) ADDITIONAL CONDITIONS.—The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) PRELIMINARY DECISION DEADLINE.—The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for

significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(*l*) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this sub-

section by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

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[2] So in original. Probably should be "contractual".

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application

for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limi-

tation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) **Reports**

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(*o*) **Application fees**

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No

discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

3. 33 U.S.C. 1342(a) provides:

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this

title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

4. 33 U.S.C. 1362 provides in pertinent part:

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

5. 33 C.F.R. 328.3, as amended by the Clean Water Rule, provides:

Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this sec-

tion. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) *Definitions.* In this section, the following definitions apply:

(1) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring.* The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a

tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the

nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding,

spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(d) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water

surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.